

ARBITRATION SERVICE OF PORTLAND

**City of Stayton,**

**Claimant,**

vs.

**JCNW Family LLC,**

**Respondent.**

ASP No. 141222

**FOURTH SUPPLEMENTAL  
AWARD**

Claimant has requested the entry of a fourth supplemental award to account for the successes and failures of the directives and requirements set forth in awards issued in August 2015 and January 2016, and to develop a workable plan for the development and construction of a permanent stormwater drainage system from the Phillips property to Mill Creek.

**BACKGROUND**

The relevant history of this case is set forth below as substantially drawn from Claimant's Hearing Memorandum. The Final Award in this case required Respondent to create and begin implementation of a permanent stormwater facility to take the overflow stormwater from the Phillips pond north to Mill Creek. The Final Award further established that during the period of time between entry of the Final Award in the summer of 2015 and final construction of the permanent facilities, there would be improvements made to the pond and weir that would prevent unauthorized discharge from the pond until such time as the permanent system was constructed.

Despite the prior representations from the Respondent and its engineer at the time, it became clear early on that it was not possible to contain the stormwater within the pond under the circumstances presented. Respondent retained another engineer who proposed constructing a concrete weir wall to replace the rip-rap weir originally installed, and to increase the height of a portion of the berm. It was understood that this new construction would not contain the stormwater, but would direct the stormwater across private property to the Salem Ditch and would allow for monitoring of the amount of stormwater that overtopped the weir.

During the course of the winter of 2015/2016 a significant amount of stormwater was discharged from the Phillips pond onto private property to the west. That water migrated across private property into the Marion County ditching system, across more private property, and eventually ended up in the Santiam Water Control District's Salem Ditch. It was anticipated, based on optimistic representations from JCNW, that authorizations were going to be obtained from those impacted private property owners to

allow water overflowing the weir to cross over their respective properties. It was also anticipated that the Santiam Water Control District was prepared to approve the addition of stormwater into the Salem Ditch.

The directive set forth in the Third Supplemental Award was not successful in many respects with regard to the development of a temporary stormwater drainage plan:

1. Respondent was not successful in obtaining a lease from the immediate adjacent property owner (Roberts) for a secondary detainment area;
2. Respondent was not successful in obtaining permission from all of the private property owners impacted by this plan to allow overflow stormwater from the Phillips property to cross over their lands: Respondent was not successful in obtaining an easement from Bauman; Respondent did obtain an easement from the Marilyn Weitman Trust.
3. A partial “comprehensive written plan” for phase one was developed; and
4. Respondent was unsuccessful in obtaining approval from the SWCD, Marion County, or any of the other agencies that may require approval of the plan. Marion County informed Respondent that no permit was required at this time. The County’s email communication was attached to the March 8, 2016 status report submitted by Respondent.

Respondent was successful in:

1. The eventual development and execution of a Hold Harmless agreement with the Claimant,
2. Making improvements to the weir (including the installation of a water monitoring device) and
3. Submitting a “detailed written plan document” for phase two of the project on March 15, 2016. Said plan document is titled “Temporary Stormwater Management Plan” and contains a two-stage proposal for an initial temporary plan which lays the foundation for the construction of a permanent plan by October 31, 2017.

## **FURTHER IMPREMENTATION OF THE GOALS OF THE FINAL AWARD**

To further implement the goals established in the Final Award, this Fourth Supplemental Award is entered, as follows:

**Development of the Permanent Stormwater Drainage Plan.** It is essential that a stormwater drainage facility be constructed as soon as possible to direct overflow stormwater from the Phillips property to Mill Creek. Respondent’s recently-submitted proposal (New Plan) presents the best plan for accomplishing that goal. The New Plan contains a Step One (construction of a temporary drainage system) and Step Two (construction of a permanent drainage system); this two-step process is necessitated by the anticipated delay in obtaining all of the required permits and approvals for a permanent drainage system. Respondent will begin immediate implementation of the plan



submitted on March 15, 2016, after obtaining the required approvals.

**Status Reports.** In the implementation of the proposed plan, the Respondent will provide the following reports to Claimant and the Arbitrator, following the stated schedule:

1. Report on acquisition of Public Utility Easements over the properties to the north between the Phillips pond outfall and Mill Creek. Report at least every 14 days beginning May 1, 2016, until said easements are obtained and approved.

2. Report on the overflow and pond height measurements. On the first day of each month, from May 1 to October 1, 2016; thereafter report weekly until April 1, 2017.

3. Report on the status of obtaining the removal/fill permit from the Oregon Division of State Lands and the U. S. Army Corps of Engineers for construction within the wetlands. Report at least every 14 days beginning May 1, 2016, until the permit is issued.

4. Report on the status of obtaining a 1200C permit from the Oregon Department of Environmental Quality. Report at least every 14 days beginning May 1, 2016, until the permit is issued.

5. Report on the status of obtaining a floodplain permit from Marion County for construction that will be performed within the identified floodplain. Report at least every 14 days beginning May 1, 2016, until the permit is issued.

6. Report on the status of obtaining a floodplain permit from Marion County for construction that will be done within the identified floodplain. Report at least every 14 days beginning April 1, 2016.

7. Report on the status of preparation of the construction plans. Report at least every 14 days beginning May 1, 2016.

8. Report on the status of construction of the temporary drainage system once construction begins, every 14 days until construction is completed, inspected and approved.

Reference is made to the Memorandum from Dan Fleishman, dated March 11, 2016 (incorporated by reference into this document) as it relates to the anticipated permits and approvals required for this project and not to the deadlines, which are set forth below.

**Deadlines.** The following deadlines will guide the completion of the respective components of this plan:

It is the Arbitrator's understanding that the proposal submitted by JCNW on March 15, 2016 is now considered approved by the City of Stayton, except for the exact route alignment of the temporary ditch to Mill Creek.

**May 15, 2016.**

- The City and JCNW will have completed the route alignment for the proposed new ditch relating to the temporary drainage plan. As soon as the City has approved the route alignment proposed by JCNW, the easement facilitator hired by JCNW will begin meeting with property owners to obtain the necessary easements. The necessary easements will be obtained by **July 1**.
- JCNW, in consultation with the City's Director of Planning and Development, will prepare a definitive list of the permits required for the construction of the temporary facility.
- The fieldwork for a wetlands study will be performed. The study will be completed by **May 31**. After the study has been completed, Respondent will diligently pursue the requirements for obtaining a DSL wetlands permit. The permit application will be submitted by **June 1** with a goal to have the permit issued by **September 1**.
- The ACE removal/fill permit will be submitted.

**July 1, 2016.**

- The easements required to complete the temporary drainage system will be secured. If it appears at this time, or earlier based on reports received, that JCNW cannot negotiate the easements necessary to implement the temporary drainage system, the City may elect to step in to exercise its condemnation powers to secure the necessary easements, and to otherwise take over easement negotiations with the impacted property owners.
- Construction plans will be submitted to the City. The plans must comply with the municipal code and public works standards.
- The final storm drainage report will be submitted.

**Hearing – July 15-31, 2016.** A hearing will be conducted sometime during the last two weeks of July to perform a thorough review of the status of the New Plan and to consider any and all issues that may need to be addressed to ensure that the temporary stormwater drainage facility will be built and functioning before the end of October 2016. An agenda will be developed, with input from the parties, to identify and address all of the issues existing at that time. It is at this hearing the Arbitrator may address, among other issues, a request by the City to take over all or a portion of the project, a request by Respondent to lift the stop work order for some lots, imposition of incentives and/or penalties (including an award of reasonable attorney fees and related costs), or any other proposals to improve and better implement the temporary and permanent stormwater drainage plans and to ensure timely and proper construction.

**August 1, 2016.**

- The flood plain development permit application will be completed and submitted to Marion County.
- The Stormwater Discharge permit application will be completed and submitted to Marion County.
- The DEQ 1200C permit application will be completed and submitted to DEQ.

**August 14, 2016.**

- The performance bond will be posted under PWSCS Sec 102.05 B, and agreements reached with the City for inspection of the work.
- The pre-construction meeting will be conducted.
- The site development permit will be issued.

**August 18, 2016.** Start construction of the temporary drainage facility.

**October 10, 2016.** All construction for the temporary facility will be completed. A final punch list will be prepared.

**October 18, 2016.** All punch list items must be completed and approved by the City; all inspections will have been conducted; the temporary facility will receive final approval from the City.

**October 21, 2016.** Warranty Bond Submittal (Warranty period begins).



**March 15, 2017.** All permits obtained for construction of the permanent facility will have been issued.

**By July 15, 2017.** Completion of the construction of the permanent facility.

**Adjustments to the Stated Deadlines:** The deadlines listed above may be adjusted for good cause shown. "Good cause" shall primarily refer to the existence of circumstances beyond the control of Respondent or Claimant. A request for an adjustment must be submitted at least 10 days before the subject deadline, unless circumstances beyond the control of the party bound by the deadline prevent that party from complying with this requirement. The permit or approval requirements set forth above may be modified if JCNW submits a written statement from the governmental agency requiring a new deadline or indicating that the permit or approval is not required.

**Adjustments to the Stop Work Order:** The Stop Work Order issued by the City of Stayton, and presently in effect relating to the Phillips Property, is hereby amended to allow the Respondent or a construction contractor or developer associated with Respondent, to apply for up to three building permits on lots presently controlled by the Stop Work Order. However, the final building permit for any of the three possible lots cannot be issued unless Respondent has complied with the requirements of this supplemental award at the time of the request – as determined by the Arbitrator.

Dated this 10<sup>th</sup> day of May, 2016

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Daniel L. Harris, Arbitrator

ARBITRATION SERVICE OF PORTLAND

**City of Stayton,**

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vs.

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**Respondent.**

ASP No. 141222

**ORDER ON CLAIMANT'S  
MOTION TO RECONSIDER  
DENIAL OF SUPPLEMENTAL  
COST BILL**

Claimant filed its Motion for Reconsideration of Denial of Cost Bill on April 8, 2016. Respondent filed a memorandum in response to said motion on April 19, 2016. Having reviewed the filings, researched the issues presented, and otherwise considered said motion in relation to the history of this case, this ORDER is entered:

The issue presented by this motion is whether Claimant has the right to an award of reasonable attorney fees and costs for fees and cost incurred as part of the process of implementing the Final Award entered in this action. As stated by counsel for Claimant, the basis for the request originates in the language of the Development Agreement entered into between the parties, which contains the following language:

The parties hereto agree that should any suit or action be filed to enforce the terms of this Agreement or any breach thereof, the losing party agrees to pay the prevailing party's reasonable attorney fees in an amount to be set by the court, including costs, disbursements and any such attorney fees associated with any appeal therefrom.

This contractual provision authorizes the issuance of an award for reasonable attorney fees and costs relating to the breach of the Development Agreement, not the implementation of the Final Award entered arising from the breach of the terms of this agreement. The contractual language used in the Development Agreement does not specifically authorize a continuing right to an attorney fees award for implementing the provisions of the Final Award resulting from the breach of said agreement.

There might be a basis for a supplemental attorney fees and costs award if the fees and costs were expended in an effort to collect the money award entered from the original cost bill. But that basis has not been articulated in the motion and usually requires

specific language in the relevant contractual provision authorizing collection of fees and costs in the process of attempting to collect an unpaid judgment.

For the reasons stated above, the Motion for Reconsideration of Denial of Cost Bill is DENIED.

Dated this 10<sup>th</sup> Day of May, 2016

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Daniel L. Harris, Arbitrator